

*United States Court of Appeals  
for the Second Circuit*



**APPELLEE'S  
APPENDIX**



ORIGINAL

74-1164

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 74-1164

UNITED STATES OF AMERICA,

Appellant,

-against-

FRED FERNANDEZ,

Appellee.

On Appeal from the United States  
District Court for the Eastern  
District of New York

APPENDIX FOR APPELLEE



ELEANOR JACKSON PIEL  
Attorney for Appellee  
36 West 44th Street  
New York, N. Y. 10036  
MU 2-8288

**PAGINATION AS IN ORIGINAL COPY**

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**EXCERPTS FROM MINUTES OF PROCEEDINGS ON  
NOVEMBER 8, 1972 BEFORE HON. ANTHONY J.  
TRAVIA, U.S.D.J.**

**[Pages AA-2 and AA-3 following]**

not required.

MRS. PIEL: When would I get the transcript?

THE COURT: I would direct -- I realize the problems that you fellows have out here -- I would direct that it be done as soon as is possible, almost to the extent of a daily transcript, if we can get that for her.

I don't know if we can. If we can, let's do it, we'll need it anyway. I do order a transcript to be given as soon as possible.

MRS. PIEL: It will further be the contention and this is a pro forma, but I only wish to renew that we have not really received all the exculpatory material. I have made that motion before.

THE COURT: By the way, I have a folder which they handed me, which I'm going to return to you.

MR. STECHEL: Yes, sir.

THE COURT: And from what I find in that file -- in that folder, not that file -- I don't know how many papers, I went through all of them, I don't find anything in there that would be of that nature, but I could say to you, Mr. Stechel,

if I were in your position, I would turn over  
that whole folder to her. There's nothing in  
it that would hurt you, but that's up to you.

5  
6 My suggestion would be that there's  
7 nothing in it -- I think I was asked to check  
8 for that purpose. I'm going to return that  
9 folder of papers to you.

10 MR. STECHEL: Yes, sir.  
11

THE COURT: You go over them yourself  
again and if you find -- if there is anything  
you really object to --  
12

13 MR. STECHEL: We fear for the safety  
14 of various people named in there, in light of  
15 the defendant and his associates.  
16

As a result, the FBI doesn't make a  
policy of turning over names of informants.  
17

18 THE COURT: There are so many other papers,  
19 I looked at, that are nothing.  
20

MR. STECHEL: We are satisfied that the  
Court is satisfied.  
21

22 THE COURT: I'm satisfied.  
23

MR. STECHEL: That's why I'm a little  
puzzled that Mrs. Piel can persist in allegations.  
24

25 THE COURT: She is correct that I never

DEFENDANT'S NOTICE OF MOTION

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
U.S.A.,

-against-

NOTICE OF MOTION  
71 Crim 218

FRED FERNANDEZ,

Defendant.

-----X  
PLEASE TAKE NOTICE that the defendant Fred Fernandez will present the attached motion for a hearing and to dismiss the indictment to the Honorable Jack B. Weinstein at 9:30 A.M. on Friday, July 13, 1973.

Dated: New York, New York  
July 11, 1973

YOURS,

ELEANOR JACKSON PIEL  
Attorney for Defendant  
36 West 44th Street  
New York, New York 10036

TO: ROBERT A. MORSE  
United States District Attorney  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

DEFENDANT'S MOTION FOR HEARINGS AND  
TO DISMISS INDICTMENT

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

[Same Title]

Defendant Fred Fernandez moves the court for the following relief: -

1. A hearing on the issue of continuing surveillance of the defendant and defendant's counsel from a period from some time in 1965 through the present, with particular reference to the evidence and the kind of evidence obtained through such surveillance, including but not limited to electronic surveillance, by the United States Government or its agents including the White House, the FBI, the CIA or any special agency set up to report on the activities of "subversives" or otherwise.

2. A hearing on the issue of the whitenings placed upon Exhibit "N" at the last trial to determine who altered such exhibit and for what purpose, as referred to the opinion of the Court of Appeals of May 23, 1973.

3. A hearing on the issues of the persons present in the bank on December 24, 1970, and as to where a list of any such persons made at the time by the police, FBI and bank officials might be and also on the issue of the disappearance of Exhibit "Q" at the second trial (a list of nine persons) and Exhibit "F" (a diagram) from the first Bruchhausen hearing, as referred to in the opinion of the Court of Appeals of May 23, 1973.

Defendant's Motion for Hearings and  
to Dismiss Indictment

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4. The production by the Government of witness Anthony Benjamin for interview with defense counsel as referred to in the opinion of the Court of Appeals of May 23, 1973.

5. A dismissal of the indictment based upon the continuing unfair tactics of the Government to be more particularly developed at the hearing on (1) (2) and (3) above.

6. The production of the original negative of the surveillance film so that defense counsel may peruse and make film enlargements of same or other use in preparation for trial.

7. For such other and further relief as is meet and proper in the premises.

Dated: New York, New York  
July 11, 1973

YOURS,

ELEANOR JACKSON PIEL  
Attorney for Defendant  
36 West 44th Street  
New York, New York 10036

TO: ROBERT A. MORSE  
U.S. District Attorney  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

**AFFIDAVIT OF ELEANOR JACKSON PIEL  
IN SUPPORT OF MOTION**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK  
COUNTY OF NEW YORK

}

ss:

ELEANOR JACKSON PIEL, being duly sworn deposes and says:

I am the attorney for Fred Fernandez having represented him continuously from some time in the summer of 1967. I make this affidavit in support of a motion for disclosure of surveillance information and for dismissal of the indictment.

I contend that the indictment in the instant case must have been based on illegal electronic surveillance never disclosed to defendant or his counsel. I further charge that the Government has joined with authorities of the State of New York in a long campaign of harrassment of the defendant and that the Government has suppressed evidence in the instant case in an attempt by any means whatsoever to deprive the defendant of his freedom. I request the aid of this Court and its discovery procedures in order to make a matter of record what I believe to be the truth.

This motion is made after three prior trials of this defendant on the instant bank robbery charge. It is based upon new material and information which came to counsel out of cumulative disclosures of abuses of power in the executive

department of the Federal Government involving the use of electronic surveillance and surreptitious entry (burglary) against persons held by officials to be suspect of "radicalism" and "disloyalty", including in particular persons designated as "Black Panthers". Press reports of misconduct of this nature in relation to the instant proceeding go back to 1967 (the Johnson Administration) and come forward to the still incomplete disclosures, in connection with the Watergate episode, of the organization by the present Administration of a "White House Special Investigative Unit" that made extra-legal calls upon the resources of the Department of Justice and of the Treasury, on the Federal Bureau of Investigation and the Central Intelligence Agency for purposes of harrassing persons incurring the disapproval of Administration officials. In order to set forth the background of these charges, I have prepared a recital of events involving my client, Fred Fernandez, and his prosecution by State and Federal officials commencing with my own involvement with him as his counsel in the summer of 1967.

The Anarchy Indictment

I originally met Fernandez in the detention quarters of Special Term Part XII of the New York Supreme Court in Brooklyn some time in July, of 1967. I had been asked by Mrs. Caroline Davidson, an associate attorney for the Legal Aid Society, to represent Fernandez who at that time was being held on \$20,000 bail on a charge of anarchy and conspiracy to commit arson in the third degree P.L. §§ 223, 580 (a) and an indictment therefor

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in Support of Motion

by a Queens County grand jury. Fernandez had been arrested on this charge on June 21, 1967, and held in jail on \$20,000 bail. Upon my application, Justice J. Irwin Shapiro reduced the bail to \$5,000. Fernandez posted bail and was freed from custody.

With the exception of certain short periods of time to be set forth, infra, until he was arrested on the instant bank robbery charge on February 18, 1971, the defendant was a free man. In July of 1967, Fernandez himself retained me to represent him on the anarchy charges and on another case in the state court. The other case involved an arrest on May 27, 1967, for disorderly conduct; Fernandez had been paroled on that case pending trial (to be discussed infra).

At the time I brought on the bail reduction motion my attention was called to the extraordinary press Fernandez and the 15 others arrested at the same time received. His arrest was a headline story in the New York Post and the Daily News. Prominent stories appeared in the New York Times and the Long Island Press.<sup>1</sup> Fernandez was described as connected with the Revolutionary Action Movement (RAM "dedicated to the overthrow of the capitalist system in the United States by violence if necessary". District Attorney of Queens County Thomas J. Mackell was said to have acknowledged that much of the evidence on which the indictments were based had come from police undercover agents.

The Daily News story (Exhibit "B") stated that "In

<sup>1</sup> A sample of the news stories are attached as Exhibits "A", "B", "C" and "D".

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Congressional testimony FBI Director J. Edgar Hoover recently fibbed RAM as a highly secret all-negro, Marxist-Leninist, Chinese Communist-oriented organization which advocates guerrilla warfare to obtain its goals'". The story went on to say: "Hoover charged that Stockley Carmichael, a leading black power figure had given "assistance and guidance" to a Max Stanford, identified as RAM's field chairman, in forming a Black Panther Party in New York City".

Intervention of the White House by way of inquiry concerning the arrests was reported in the New York Times (Exhibit "C") and inquiry from both the White House and the FBI was reported in the Long Island Press (Exhibit "D"). Moreover the Times reported that the RAM group had been under surveillance by the police since July, 1965.

Counsel for the defense filed motions challenging the indictments particularly on the anarchy charges, which accused the defendants of advocating the overthrow of the United States government. In January, 1968, a superceding indictment was filed against Fernandez and the others (Queens County Indictment No. 134-68), limiting the anarchy charges to advocacy of the overthrow of the government of the State of New York. In March I brought a proceeding on behalf of Fernandez in this Court (later transferred to the Southern District) requesting a three judge court to declare the anarchy statutes of the State of New York ("Gitlow" Statutes) unconstitutional and to enjoin the

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state proceedings. A three-judge court dismissed the complaint. Fernandez v. Mackell 288 F. Supp 348. The United States Supreme Court noted probable jurisdiction in December, 1968. After three full oral arguments the court finally, on February 23, 1971, affirmed the District Court's dismissal of the complaint.

Samuels v. Mackell 401 U.S. 66.

During said arguments, however, Frederick C. Ludwig, Assistant to District Attorney Mackell stated that law enforcement officers had infiltrated the RAM group "thoroughly" (See Exhibit "F" attached). Upon motion of defendant Fernandez in the State Supreme Court (Queens) after February, 1971, it was revealed that there had been electronic surveillance of defendant Fernandez in the months before the indictment or before June 20, 1967. No transcripts were turned over to defense counsel. I do not know to what degree electronic surveillance of Fernandez occasioned his indictment for anarchy. On February 15, 1973, the anarchy case was dismissed by Justice Albert Bosch upon Fernandez' motion to dismiss for failure to prosecute. See New York Daily News story (Exhibit "K").

The Disorderly Conduct Arrest of  
May 27, 1967

When Fernandez retained me on the anarchy charges he also retained me to represent him in the disorderly conduct case (P.L. § 722 (3) Queens County Criminal Court No. A2765), the arrest in which preceeded by nearly a month his arrest in the anarchy case.

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Before a trial on that charge took place, on October 3, 1967, Fernandez was indicted by a Queens County grand jury for the crimes of assault in the second degree and resisting arrest both new charges arising out of the same facts as the disorderly conduct arrest on May 27, 1967. (P.L. §§ 242, 1851, Ind. No. 1725-67).

On November 17, 1967, Fernandez was convicted of the disorderly conduct charge in the Queens Criminal Court and on December 6, 1967, sentenced to 90 days in City prison. This conviction was reversed on December 6, 1968, by the Appellate Term of the Supreme Court, which ordered a new trial. Fernandez was tried again and convicted on March 16, 1970, and that conviction was again on October 20, 1970, reversed. This time the Appellate Court acquitted Fernandez of the charge by expressly stating "Defendant's guilt was not established beyond a reasonable doubt".

Despite his acquittal of the charges on the same facts in the disorderly conduct case, and despite two proceedings (Article 78) in the State Supreme Court, Appellate Division, an attempt to appeal the case to the New York Court of Appeals and a petition for certiorari in the Supreme Court of the United States based on the contention that a second trial on the same facts, this time for assault and resisting arrest, would constitute double jeopardy, Fernandez was denied all extraordinary relief

[Counsel's Note:

This indictment was finally dismissed by the Appellate Division, Second Department on December 3, 1973, the day before the indictment was dismissed in this case. See People v. Fernandez,  
A.D.2d (December 3, 1973).]

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and brought to trial in the State Supreme Court in Queens in July, 1972, (Queens County Indictment No. 1725-67). One jury before Justice William G. Giaccio was sworn and then after opening statements, discharged upon motion of the District Attorney over the objection of defense counsel. A second jury convicted Fernandez of assault second-degree and resisting arrest. A sentence of four years in the state penitentiary was meted out to Fernandez by Justice George J. Balbach on August 30, 1972. [Counsel's Note: Conviction reversed December 3, 1973. See Counsel's Note on previous page.]

Assault and Possession of Dangerous Weapons Arrest of September 5, 1968

On September 5, 1968, Fernandez was arrested on a charge of assault in the 2nd degree and possession of weapons and dangerous instruments (P.L. §§ 120.05, 265.05; Queens County Ind. 1849-68). He was released from custody on \$5,000 bail and initially represented by another lawyer, Arthur L. Mass. The month of October saw a great deal of publicity, much of it originating in the Queens County prosecutor's office connecting this Fernandez case to the New York City mayoralty election of that year. (See Exhibit "G" and "H"). Fernandez was remanded to jail pending trial. His lawyer (Mass) ordered to an immediate trial in the midst of the publicity, sought removal to this Court pursuant to 28 U.S.C. 1443 et seq on or about October 28, 1969. Judge Anthony J. Travia remanded the case to the State Court on November 3, 1969.

Acting on behalf of Fernandez, in concert with Mr. Mass,

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I applied to the Appellate Division of the Supreme Court, Second Department, for an order staying that trial on the ground of the prejudicial effect of the publicity which stressed Fernandez' relationship with "Black Panthers" and as a "black militant". I secured a temporary stay of the trial on November 3, 1969, [Election Day was November 4]. After a conference with the court between myself and a representative of the District Attorney's office, it was agreed to postpone all the Fernandez cases in Queens County until March 5, 1970.

On December 9, 1970, the case came to trial before a jury and Justice Anthony Livoti. I then again represented Fernandez, Mr. Mass having withdrawn. At the end of that day, the indictment dismissed for failure of proof, and the jury was discharged.

The Bank Robbery Charge--Three Trials and a Fourth Trial Pending Before This Court

Fernandez was arrested on February 18, 1971, at 7:15 A.M. in his own home in Queens at 94-17 32nd Avenue, East Elmhurst, by FBI Agent Lawrence Sweeney in the company of four other FBI agents and charged with violation of 18 U.S.C. § 2113 (a) and (d) (bank robbery), alleged to have taken place at 2 P.M. on December 24, 1970, at the First Federal Savings and Loan Association at 44-04 Kissena Blvd., Flushing, Queens. I was called by his mother, Mrs. Violet Fernandez, with whom he lived, on the morning of February 18, 1971, and agreed to represent him at his arraignment before Federal Magistrate Max Schiffman. That hearing took place in the early afternoon in the Federal build-

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ing at 225 Cadman Plaza East. At the time of the arraignment, Deputy United States Attorney, Lawrence Soicher told the Magistrate that Fernandez was under indictment for anarchy and arson, that he was a Black Panther member of the Revolutionary Action Movement (RAM), was a "trigger man" for the group and that he (Soicher) had information that Fernandez had participated in the robbery in order to join other RAM members (Herman B. Ferguson and Arthur Harris) in Algiers. Soicher also said that Fernandez was dangerous and violent and that the government had a strong case, including eye witness identification against Fernandez. Soicher demanded \$300,000 bail. (See Exhibits "I" and "J"-- stories in the Long Island Press and the New York Times on February 19, 1971). Bail was set by the Magistrate at \$100,000 and Fernandez has been continuously in custody since February 18, 1971.

At that time, as I was later to learn at the first trial, no eye witness had identified Fernandez. Nonetheless, although Fernandez was in custody and available to be put in a lineup, the FBI agent, Lawrence Sweeney went before a grand jury on February 25, 1971, to present other testimony on which an indictment was secured against Fernandez. Later, on March 2, 1971 a Fernandez "mug" shot, along with an "impermissibly suggestive" array of other black persons (so found by the Court of Appeals, 456 F. 2d 642), was shown to four (4) bank employees (according

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to Sweeney's testimony B 112, 117, 119, 121).<sup>2</sup>

Despite three trials, two (2) hearings prior to trial, and numerous hearings during the course of the last trial, there has been no evidence disclosed by the Government as to how the FBI were led to the arrest of Fernandez in his home in the early morning hours of February 18, 1971, 56 days after the bank robbery. The prosecution's crucial eye-witnesses at the trial placed the bank robber, supposedly Fernandez, in a different position from where the bank robber depicted in the surveillance film and matched to the Fernandez mug shot by those same witnesses was plainly shown by the surveillance film to have been stationed during the robbery. This conflict in the evidence offered by the Government was established only at the third (3rd) trial after the defense produced the entire surveillance film for viewing by the court and jury. The conflict in the evidence thus demonstrated was obscured, however, owing to the fact that the eye-witness placement of the defendant marked on a diagram at prior trials had been whitened over while this significant document was in possession of the prosecution in between the second and third trials. This tampering with the evidence has been placed before this Court for review and consideration before this fourth trial proceeds.

I now recall a conference in May or early June 1971, in

---

<sup>2</sup> References to the various trials and hearings are as follows  
B for Bruchhausen hearing and trial, C for Costantino trial, and  
T for Travia trial followed by page number.

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the office of Peter Schlam, the Government assistant who tried the Fernandez case twice in the summer of 1971. Schlam had said he would turn over to me all exculpatory material. This was to have included FBI 302 reports on Arthur Teare, another black, who had been arrested as one of the four bank robbers involved in the December 24, 1970, robbery. The case against Teare was dismissed on grounds of misidentification prior to the arrest of Fernandez. Schlam asked me if I thought the case against Fernandez was a political case---and if I thought Fernandez was being prosecuted because of his association with the "Black Panthers". I said that I thought the prosecution against Fernandez was politically motivated. He said that such an idea was ridiculous. I did not think more about that aspect of the case until recently.

Parenthetically, during the period from 1967, to some time, I believe, in 1970, Anthony Lombardino was an Assistant District Attorney in the office of District Attorney Thomas J. Mackell. Some time in 1969, or 1970, Mr. Lombardino joined the staff of United States Attorney Edward Neaher as Chief of the Criminal Division. Subsequent to the first two trials of Fernandez on the bank robbery charges in June and July, 1971, Lombardino, moved back to District Attorney Mackell's office as Chief of the Rackets Bureau. Lombardino was the Chief of the Criminal Division during the two Fernandez trials on charges of bank robbery in 1971, and actively participated in the trials, supervising Assistant United States Attorney Peter Schlam who tried the cases for the Government. Based upon Lombardino's

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background in Mackell's office, I believe it is logical to assert that Lombardino was privy to all the information gleaned on Fernandez in the state and federal investigatory files.

These circumstances can now be seen to be relevant. At the first trial before Judge Bruchhausen, after Agent Sweeney had testified, the following colloquy took place:

MRS PIEL: Prior to this witness--just at this moment I had asked for the § 3500 material with regard to this witness and I hear Mr. Lombardino say we can't give it all to her.<sup>3</sup>

I would like to make demand of the Government for all of the § 3500 material having to do with Mr. Sweeney's investigation of this case.

MR. SCHLAM: Your Honor, the Government has turned over a great bulk of statements which Mr. Sweeney has made in the course of his investigation.

There is absolutely nothing which is being withheld from Mrs. Piel. I make that representation to your honor. (Emphasis supplied)

MRS. PIEL: I only hear what Mr. Lombardino said, which is "We can't give everything to her".

THE COURT: You have everything now, according to the statement.

MRS. PIEL: Could I have a list of it so I can be sure I have what I am supposed to have?

MR. SCHLAM: It has been turned over to you.

(The following occurred in open court):

THE COURT: All right, proceed. You are overruled on it. (BT 746-747).

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<sup>3</sup> I had heard Mr. Lombardino address this statement to Mr. Schlam at the very moment I asked for production of the § 3500 material.

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At the second trial before Judge Costantino, Sweeney stated on cross-examination that he had testified before the grand jury. The minutes were thereupon produced (C 149). On appeal, the Government asserted, in a brief signed by the United States Attorney Robert A. Morse and joined in by assistants David G. Trager and Howard J. Stechel, that "the failure of the Government to turn over the Grand Jury minutes at the first trial was inadvertent" (Resp. Br. No. 71-2129, p. 21). This Court is asked now to reckon with the plain inference that, if the failure to turn over the grand jury minutes was "inadvertent", then there must have been other material in Sweeney's file that Lombardino was referring to that "we can't give...to her (defense counsel)".

In its eagerness to secure a conviction the Government has changed and whitened important exhibits already referred to which, if not tampered with, could be used for impeachment of witnesses. This conduct has been termed by the Court of Appeals "an inexcusable breach of the duty of counsel to keep exhibits left in their custody inviolate so long as there is any possibility of need for their reuse" (Slip opinion of May 23, 1973, p. 3721). The Government has further kept counsel and the court in the dark as to "what has happened to the list of 30 persons in the bank at the time of the robbery and the list of nine made up by agent Sweeney in the course of the first trial" See 456 F. 2d 643 n 4" (Slip opinion of May 23, 1973, p. 3723).

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After the reversal on February 24, 1972, of the first conviction of Fernandez by the Court of Appeals, the Government did not move promptly to set the case for trial. Defense counsel argued on the second appeal that the time period between March 17, 1972, (the day the remittitur was filed) and November 8, 1972, (more than six months) prejudicially deprived Fernandez of a speedy trial. The Court of Appeals ruled against his contention.

In that interval, however, the Government was not idle. It convened a new grand jury to investigate the instant case despite the fact that Fernandez himself, had been indicted and tried twice on the charges. Summoned before that grand jury to give testimony were Jerome Reide and Horson Howard, both convicted of the crimes of bank robbery in connection with the same charges against defendant here. Reide has been held in contempt by Judge Walter Bruchhausen for his failure to testify and that case is presently on appeal.<sup>4</sup> The Government also summoned others before that grand jury including persons who were cell mates of Fernandez while in custody. Joseph Vitale, a convicted bank robber who admitted to at least nine (9) robberies, was such a witness before the grand jury. Momentarily, in the last trial, the Government intended to call him as a witness against Fernandez; the Government, however, decided otherwise (T 738).

---

<sup>4</sup> In the mail of July 6, 1973, I have received a copy of an affidavit apparently signed by both Reide and Howard detailing the events described concerning what happened to them between Fernandez' two trials (Exhibit "O").

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Also prior to trial before Judge Travia, defense counsel moved the production in court of all electronic surveillance of the defendant Fernandez. Howard J. Stechel, the Assistant United States Attorney, told the court that there was none to his knowledge and the court made no further inquiry.

The Government, further, has prevented defense counsel from meeting with or having contact with one of the four bank employees who signed his name on the back of the "mug shot" of Fernandez shown at the bank on March 2, 1971--one Anthony Benjamin who apparently is on probation from a state court conviction at the present time (See slip opinion May 23, 1973, p. 3723).

Additional facts important to this recital are as follows:

My law offices, in Suite 1212 at 36 West 44th Street, have been burglarized twice since I commenced representing Fernandez in this bank robbery case. At the time of both burglaries I shared office space with two other lawyers, Patrick M. Wall and Thomas D. Edwards. (Patrick Wall continues to occupy the space, Mr. Edwards, no longer a co-tenant, is now Chief of the Criminal Division of the United States Attorney's office, Southern District of New York as of June 15, 1973). On<sup>each</sup> occasion the burglaries were reported to the Bar Building management and to the IBM Leasing Corporation since on each occasion a typewriter leased by Mr. Edwards and Mr. Wall was taken. The dates the record reveals of the burglaries were November 29, 1971, and

May 10, 1972. I had no evidence to show that my files were gone into on either occasion, but I can offer no evidence to the contrary, either.

On the same day that the Court of Appeals filed its opinion reversing Fernandez' conviction after a third trial, May 23, 1973, there was published in the New York Times a statement by the President of the United States on allegations surrounding the Watergate inquiry (Exhibit "L"). According to that report and plan domestic intelligence operations were to be expanded commencing in June, 1970. A special investigations unit within the White House was to be formed known as the "plumbers". Newsweek for June 4, 1973, described the plan as paving "the way for bugging, burglary, perhaps even blackmail by government agents against American Citizens--among them Federal employees, antiwar activists, campus radicals and militant Black Panthers--as well as foreign students and diplomats" (Exhibit "N") Newsweek further reported that the plan was not "dead" as stated by the President (Exhibit "L"), but that over the next two years (after June, 1970,) undercover agents for the Administration made surreptitious entries to undermine the defense in at least three cases against "radicals" (Exhibit "M").

On June 12, 1973, the New York Times carried another story concerning more reports of "mysterious burglaries" of lawyers' offices. It is reported that a "Senate committee...has begun to look into whether espionage activities against dissidents may have been undertaken by elements of the White House staff or

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the Justice Department". (Exhibit "N")

Upon reviewing the events recited above, I believe that I now have reason to assert that Fred Fernandez has been the target of special and continuous government surveillance since some time in 1965, to date, and that such surveillance may well have included surveillance of my office, telephones and activities because I have represented him continuously since the summer of 1967.

I now seek discovery to determine the truth of the inference that I have made. Accordingly, I request that this Court subpoena and hear the following persons as witnesses:

Thomas J. Mackell  
Frederick Ludwig  
Anthony Lombardino  
Hon. Edward Neaher  
Robert A. Marse  
Howard J. Stechel  
David G. Triger  
Peter J. Schlam  
Lawrence Sweeney  
Lawrence Soicher

and any other person who might have knowledge of the facts so that I may inquire as to their personal knowledge of the interlocking facts alleged above. I also ask that this Court require the Government to turn over all FBI or other reports in the possession of or available to the Government concerning the investigation of Fernandez from 1965, to date, including all surveillance reports and particularly the transcripts and tapes of all electronic surveillance and all materials made

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available to it by the authorities of Queens County of the State of New York.

Following the production of such materials and a hearing on the issue of illegal surveillance of Fernandez and his attorney in this case I seek also a hearing on the issue of the tampering with the exhibit marked Exhibit "N" at the last trial. The Court of Appeals held that the ultimate issue of whether this misconduct on the part of the Government requires a dismissal of the indictment is for the District Judge sitting in this case. (See slip opinion May 23, 1973, p. 3722).

I seek further a hearing on the issue of all lists of witnesses made at or about the time of the bank robbery on December 24, 1970, or later by the FBI, the bank, the police or other persons in the bank at that time. In addition I request that the original negative of the surveillance film be turned over to me for the purpose of study and to use for making prints of relevant sections as I judge necessary to prepare for trial.

---

ELEANOR JACKSON PIEL

Sworn to before me this  
11th day of July, 1973.

---

Notary Public

SOPHIE I. BUTLER  
Notary Public, State of New York  
60-0522360  
Westchester County  
Term Expires March 30, 1978

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Exhibits annexed to Affidavit of  
Eleanor Jackson Piel in Support  
of Motion

**Exhibits annexed to Affidavit of  
Eleanor Jackson Piel in Support  
of Motion**

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**Exhibits Annexed to Affidavit of  
Eleanor Jackson Piel in Support  
of Motion**

**AA-27**

**ANSWERING AFFIDAVIT OF HOWARD J. STECHEL  
IN OPPOSITION TO MOTION**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK }  
COUNTY OF KINGS }  
EASTERN DISTRICT OF NEW YORK } SS.:

HOWARD J. STECHEL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Eastern District of New York.

2. Pursuant to an order of this Court, your deponent caused an inquiry to be made of the appropriate agencies of the Federal Government to determine if there had been electronic surveillance of the defendant FRED FERNANDEZ and his attorney in this cause; that the Federal agencies to whom this inquiry was directed are:

- (a) Federal Bureau of Investigation.
- (b) Drug Enforcement Administration.
- (c) Secret Service.
- (d) Internal Revenue Service.
- (e) Bureau of Customs.
- (f) Bureau of Alcohol, Tobacco and Firearms.
- (g) Postal Service.

3. The agencies queried as to electronic surveillance were selected as appropriate because, at the time the requests were made, these were the only agencies which had requested authority to conduct and had conducted electronic surveillance

Answering Affidavit of Howard J. Stechel  
in Opposition to Motion

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pursuant to Title III, Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351 (18 U.S.C. Section 2510 et. seq.) and the denial of any overhearing of electronic surveillance by the Federal Bureau of Investigation includes all national security surveillances authorized by the Attorney General of the United States and conducted by that agency.

4. Based upon the result of such inquiry, your deponent states, upon advice and representation of the United States Department of Justice:

(a) There has been no electronic surveillance occurring on premises known to be owned, leased or licensed by the defendant or his attorney in this case.

(b) There have been no overhearings by electronic surveillance, at any location, of any conversation in which the defendant in this cause was a party.

(c) There have been no overhearings by electronic surveillance, at any location, since February 18, 1971, of conversations to which Eleanor Jackson Piel, Esq., was a party.

(d) There has been no electronic surveillance directed against the defendant FRED FERNANDEZ or attorney Eleanor Jackson Piel, Esq.

*SJ*  
HOWARD J. STECHEL  
Assistant U.S. Attorney

Sworn to before me this  
24 day of September 1973

ANSWERING AFFIDAVIT OF PETER R. SCHLAM  
AND HOWARD J. STECHEL, IN OPPOSITION TO  
MOTION

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK }  
COUNTY OF KINGS } ss:

PETER R. SCHLAM and HOWARD J. STECHEL, being duly  
sworn, depose and say:

1. We are Assistant United States Attorneys on the staff of ROBERT A. MORSE, United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.

2. Fred Fernandez has been tried in this Court on three occasions since his arrest on February 17, 1971 for armed bank robbery. The first trial took place in June, 1971 before Judge Bruchhausen and ended in a hung jury; the second trial in July, 1971 before Judge Costantino resulted in a jury verdict of guilty that was later reversed by the United States Court of Appeals; and the third trial in November, 1972 before Judge Travia also resulted in the conviction of Fernandez, and this conviction, too, was reversed. The Government was represented by PETER R. SCHLAM at the first two trials and by HOWARD STECHEL at the third trial. This joint affidavit is being submitted as an answer to questions raised by defense counsel concerning

Answering Affidavit of Peter R. Schlam  
and Howard J. Stechel, in Opposition to  
Motion

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certain aspects of the Fernandez prosecution.

3. Defense counsel seeks information concerning whitenings on an exhibit portraying the floor-plan of the bank. PETER SCHLAM states that a review of the trial transcripts leads him to believe that the whitenings were placed on the exhibit during the time between the trial before Judge Bruchhausen and the trial before Judge Costantino; and that the whitenings were placed on the exhibit in order to avoid suggesting to witnesses places where they had made markings at the first trial. HOWARD STECHEL states that approximately three months before the third trial he received the original floor-plan exhibit; that at the third trial the Government offered in evidence a new and unmarked duplicate floor-plan exhibit; and that the original exhibit, with its previous markings, was produced by the Government for whatever purpose defense counsel wished.

4. Defense counsel raises questions concerning a written list of witnesses to the bank robbery allegedly compiled by the bank manager immediately following the crime. PETER SCHLAM states that at no time during his handling of the case was such a list in his possession; that in the courtroom during the first trial F.B.I. agent Lawrence Sweeney prepared a handwritten list of robbery witnesses at the request of defense counsel; that this list was compiled by copying the names of persons that had been interviewed by the F.B.I. and

which were contained in the F.B.I. report on to a sheet of yellow paper; that this sheet of yellow paper was given to the defense counsel and later marked by her as a defense exhibit; that defense counsel later claimed she had lost her own exhibit and a replacement was furnished to her by Agent Sweeney; and that the lists prepared by Agent Sweeney were the only such lists known to Peter Schlam. HOWARD STECHEL states that during a pre-trial proceeding before Judge Travis prior to the third trial, a typed list of each and every known witness to the crime was furnished to defense counsel in Howard Stechel's presence by Assistant United States Attorney David C. Trager; that the typed list was marked as a court exhibit; that on the first day of the third trial a typewritten list of all witnesses to the crime known to the Government was again furnished to defense counsel and again marked as a court exhibit; and that the names appearing on these lists constitute all the witnesses to the crime known to Howard Stechel.

5. Defense counsel inquires as to the availability as a witness of one Anthony Benjamin who, on March 2, 1971, made a pre-trial photographic identification of Fernandez as one of the armed robbers. PETER SCHLAM states that he had one conversation with Anthony Benjamin; that this conversation took place at the bank prior to the first trial; that the purpose of the conversation was to interview Benjamin as a potential witness; that during the interview Benjamin offered

Answering Affidavit of Peter R. Schlam  
and Howard J. Stechel, in Opposition to  
Motion

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excuses as to why he would be unable to give testimony about the bank robbery; and that during the conversation Benjamin admitted that he was afraid to testify. HOWARD STECHEL states that he has never met or conversed with Anthony Benjamin; that some time prior to the third trial Benjamin was convicted of embezzlement involving the subject bank and had been placed on probation by a Queens County Court; that since the third trial Howard Stechel has ascertained the telephone number of Benjamin's probation officer and has made this telephone number known to defense counsel; and that prior to the third trial Howard Stechel made known to defense counsel Mr. Benjamin's last known address.

6. Defense counsel asks whether the Government is in possession of any evidence that may exculpate Fred Fernandez. PETER SCHLAM states that he knows of no exculpatory evidence. HOWARD STECHEL states that he knows of no exculpatory evidence; that prior to the trial before Judge Travia, Howard Stechel turned over to the Court for in camera inspection the complete F.B.I. report possessed by the Government concerning this case; that Judge Travia advised counsel that he had reviewed this material and that he found no exculpatory evidence therein.

7. Defense counsel inquires as to whether the Government is in possession of any photographic exhibits from the prior trial, and particularly the negatives from which the surveillance films were developed. HOWARD STECHEL

Answering Affidavit of Peter R. Schlam  
and Howard J. Stechel, in Opposition to  
Motion

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states that to his knowledge, all photographic exhibits were retained by the District Court at the conclusion of the third trial, including the negative of the surveillance film.

---

PETER R. SCHLAM  
Assistant United States Attorney

---

HOWARD J. STECHEL  
Assistant United States Attorney

Sworn to before me this  
15th day of October, 1973

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**MINUTES OF PROCEEDINGS ON JULY 13, 1973  
BEFORE HON. JACK B. WEINSTEIN, U.S.D.J.  
[Pages AA-36 to AA-60 following]**

1 [1]

2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF NEW YORK

4 - - - - - x

5 UNITED STATES OF AMERICA, :  
6 - against - : 71 CR 2187 FRED FERNANDEZ, :  
8 Defendant. :  
9 - - - - - x10 United States Courthouse  
Brooklyn, New York11 July 13, 1973  
12 9:30 A.M. o'clock

13

14

15 Before :

16 HONORABLE JACK B. WEINSTEIN, U. S. D. J.

17

18

19 I hereby certify that the foregoing is a  
true and accurate transcript from my sten-  
ographic notes in this proceeding.  
20 \_\_\_\_\_  
21 Daniel D. Simon  
Official Court Reporter  
U.S. District Court for the  
Eastern District of N.Y.

22

23

24

DANIEL D. SIMON  
OFFICIAL COURT REPORTER

25

1 [2]

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2 APPEARANCES:

3 - ROBERT A. MORSE, ESQ.  
4 United States Attorney for the  
Eastern District of New York

5 BY: H. STECHEL, ESQ.  
6 Assistant United States Attorney

7 ELEANOR JACKSON PIEL, ESQ.  
8 Attorney for Defendant

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2 THE COURT: Yes, good morning.

3 MRS. PIEL: Your Honor, I didn't know about  
4 this pre-trial conference until I called the Clerk's  
5 office the day before yesterday and found I should  
6 have been notified.

7 I called up, and because I was working on a  
8 motion to present to you today, I spoke to your law  
9 clerk who said I should present it anyway, and I  
10 did.

11 You have the papers?

12 THE COURT: My clerk is getting them.

13 MR. STECHEL: I got a copy of them.

14 MRS. PIEL: But the United States attorney  
15 only had one day's notice.

16 I have the memorandum of --

17 THE COURT: All right, what is your applica-  
18 tion.

19 MRS. PIEL: Well, it is predicated on a rather  
20 lengthy affidavit.

21 The application in writing is for a hearing or  
22 for three hearings. And I have been thinking about  
23 it --

24 THE COURT: Excuse me. Mark, the motion  
25 papers are in my briefcase.

1 [4]

2 MRS. PIEL: -- I have been thinking about  
3 it since I filed the papers. I think my real appli-  
4 cation is preliminarily an application for answering  
5 affidavits from the government on the charges which  
6 I make, which I think are supported by at least the  
7 exhibits. They are supported, I say, at least by  
8 newspaper stories that suggest the truth of the  
9 matters which I set forth, some of which are of my  
10 own personal knowledge and others -- other matters  
11 which are only matters of rumor as we know of things  
12 appearing in the newspapers.

13 But I think my first application is for answer-  
14 ing affidavits.

15 Now, to go into the substance of what I charge -

16 THE COURT: Well, before you do that perhaps  
17 the government would like time to answer.

18 MR. STECHEL: Well, I could do it that way  
19 or on the other hand I could explain the government's  
20 position and see where the Court would lean, and  
21 then --

22 THE COURT: Well, it might be a good idea in  
23 view of the fact that these are serious charges for  
24 the government to consider very seriously what it  
25 says and put it in writing.

2 MR. STECHEL: Well, you are referring now  
3 to the first part of the motion having to do with  
4 surveillance and Watergate, and so forth?

5 MRS. PIEL: All of it. Every aspect of it.

6 MR. STECHEL: Well, your Honor, as to the  
7 latter two parts dealing with the exhibit N, and  
8 dealing with the list of witnesses, if the Court  
9 wants a hearing I have no objection to a hearing.  
10 I have already testified --

11 THE COURT: I do not want an unnecessary  
12 hearing. I would like to get the advice of the  
13 government on what we should do.

14 MR. STECHEL: All right, let me go through  
15 it then. I will try to keep it as short as I can.

16 THE COURT: Don't you want to submit papers?

17 MR. STECHEL: I do not think it is particularly  
18 necessary. I think I can crystalize what the  
19 situation is if you want to have me do it that way.

20 THE COURT: Well, it is up to you. I'm not  
21 going to tell you how to try your case.

22 MR. STECHEL: On the offered exhibit N at  
23 the last trial, which the Court of Appeals has  
24 recently talked about, point one, if the defense  
25 wishes the government, as the Court of Appeals mentioned,

1 [6]

2 would be more than happy to employ an independent  
3 expert to remove the whitening from exhibit N,  
4 which was a diagram from the prior trial -- if it  
5 can be done by a neutral and impartial expert, and  
6 I think it can be done, certainly the government has  
7 no objection and it would pay for it.

8 As to the alleged misconduct having to do  
9 with this alteration, the government denies mis-  
10 conduct.

11 First of all I have already sworn in front  
12 of the last Fernandez jury, and the jury convicted  
13 him -- a jury had earlier convicted him -- that I  
14 did not alter that exhibit.

15 And the Court of Appeals did not say I tampered  
16 with it. And I think the accusation made in these  
17 papers is very close to slander since it charges me  
18 basically with obstruction of justice, which I deny  
19 and resent.

20 However, if there is a hearing desired on  
21 this matter I will be glad to re-take the witness  
22 stand and I can explain whatever I know about that  
23 exhibit.

24 Mr. Schlam would be equally happy to do so  
25 as would Mr. Heinemann and all assistants in the

2 Eastern District of New York, and any other  
3 assistants that the defense counsel wishes to call.

4 But our position is very clear as to one  
5 matter, either the exhibits should be fixed for the  
6 simple reason -- I think the exhibits should be fixed  
7 for the simple reason that it remains a red herring,  
8 in other words, I mean it is an exhibit which was  
9 used earlier at the Fernandez trial and it was used  
10 at the last trial, and in between the trials,  
11 whitening came on the exhibit.

12 Now, at the second Fernandez case defense  
13 counsel complained about the use of the exhibit from  
14 the first one, namely, that there were some markings  
15 on it and it was suggestive and it was improper,  
16 and thereafter as to that exhibit some whitening  
17 got on that exhibit. I don't know how. I wasn't  
18 personally involved with it. I don't even know who  
19 did it. But I would be happy to agree to have a  
20 hearing, the subpoena power exists and is available  
21 to her, and to completely clarify this issue because  
22 neither I nor do I believe anyone else has anything  
23 to hide. But certainly I did not tamper with the  
24 exhibit. I do not want to leave it sitting as  
25 another point of argument for the jury in the fourth

2 Fernandez trial, because these charges, a lot of  
3 them may be characterized as diversionary tactics  
4 by the defense to avoid the question of the guilt  
5 or innocence of the defendant.

6 So on the exhibits we can have a hearing. I  
7 will be happy -- the exhibit is in the hands of the  
8 Court now -- I will be happy to hire an expert to  
9 fix the exhibit and anything else that Mrs. Piel  
10 wants in order that simple truth and justice prevail  
11 in this protracted and unfortunate repetitious case.  
12 That is, as to the exhibit, I do not object to a  
13 hearing.

14 As to the list of the witnesses, again I  
15 don't object to it.

16 As to this matter both Mr. Sweeney -- I think  
17 Mr. Sweeney has testified in the past under oath,  
18 and that Mr. O'Connor, the bank manager, has testified  
19 under oath to that. If another hearing is necessary  
20 again I do not object. The only thing that can come  
21 out is the truth, which no one has any reason to feel  
22 would be otherwise.

23 As to the point of the so-called surveillance  
24 or Watergate question, the manner in which this  
25 case developed has now been brought out three times,

2 I believe, so certainly it is very clear since the  
3 last trial that the defendant was identified from  
4 a surveillance picture. He was identified from a  
5 surveillance picture by at least three informants,  
6 all of whom were discussed at the last trial, one  
7 of them was a man first mistakenly arrested for the  
8 charge, Arthur Teare, that is number one, and,  
9 secondly, we have his sister, a girl by the name of  
10 Wendy Villalobos, and she is the sister of Teare.  
11 And the day that Teare was arrested in January 1971  
12 for this offense -- also identified the surveillance  
13 picture showing the man in the pea coat and a cap  
14 as being Fernandez.

15 Then there is a third informant, your Honor,  
16 of -- I don't even know his identity myself and I  
17 don't care to know it because I would just rather  
18 not know it -- but there is a third FBI informant  
19 who supplied information many times to the FBI,  
20 which Mr. Sweeney discussed it on the stand the last  
21 time, who also identified Mr. Fernandez.

22 So, your Honor, there are three informants  
23 that led to the man's arrest. And how, under what  
24 theory, some alleged surveillance in 1965 by the  
25 State of New York has to do with this arrest is

2 beyond me. It has nothing to do with it. This man  
3 was identified from a picture of the criminal in the  
4 act of committing the crime. It is a question of  
5 identification.

6 And the government's position at this instance  
7 is that there is no basis to go into all of this  
8 Pandora's box that is being opened up by the defense.

9 But as to the general accusations that Mrs.  
10 Piel's office was once burglarized, and that is  
11 somehow connected to the so-called Watergate episode --  
12 there is no offer of proof. There is no rhyme or  
13 reason to connect it to this. I do not know what  
14 it has to do with this case. The evidence has been  
15 above board three times. Mrs. Piel has observed the  
16 evidence. I can't imagine what an alleged burglary  
17 of her office, if it did indeed occur, and where a  
18 typewriter is stolen, has to do with this case.

19 MRS. PIEL: Well, I am first rather shocked  
20 at the very commencement of Mr. Stechel's presenta-  
21 tion because he has been in charge of this case for  
22 one appeal and one trial, and the second appeal, and  
23 he still doesn't know who lightened the exhibit that  
24 the Court of Appeals has said shculd not have been  
25 lightened. He doesn't know. He has made no

2 investigation whatsoever --

3 MR. STECHEL: That is not true. But go on.

4 MRS. PIEL: -- well, I am taking it on the  
5 basis of what you told the Court here. If you do  
6 know then that is something else --

7 MR. STECHEL: I have already said that. I  
8 have been on the stand on the subject. I was called --

9 MRS. PIEL: Mr. Stechel --

10 MR. STECHEL: -- excuse me. Perhaps I wasn't  
11 actually called, but I had to take the stand in front  
12 of the last twelve people that convicted Fernandez,  
13 and to swear to my innocence of the charge. Now  
14 they went ahead and convicted him a second time.

15 I did not tamper with that exhibit. I never  
16 touched it or put any white mark on it. I do not  
17 have any personal knowledge of who did. I would be  
18 delighted to have a hearing on the subject because  
19 it is a red herring. That is my position. So I  
20 want to have that made very clear; I did not touch  
21 that exhibit.

22 MRS. PIEL: Your Honor, first the thrust of  
23 my affidavit and in my motion is not to punish Mr.  
24 Stechel. These are accusations made against the  
25 government of the United States acting in concert

2 with the state officials. And I only have a piece  
3 of the iceberg. I don't know what went on.

4 I have represented Mr. Fernandez since 1967.  
5 And I started representing him on a pro bono basis  
6 because a lady in the Legal Aid Society by the name  
7 of Mrs. Caroline Davidson said that I was the only  
8 person who had had an anarchy case since Gitlow, and  
9 if I was still interested in anarchy, she had another  
10 anarchy case for me. And I was.

11 The first anarchy case was the William Epton  
12 case, which I lost.

13 I want you to know that I got into this case  
14 because I was interested in an issue of law. And as  
15 a matter of fact I tried very hard through three  
16 arguments laid before the Supreme Court of the United  
17 States to get the Supreme Court interested in the  
18 issue of law, and I failed. There is no law on the  
19 anarchy question.

20 However, I <sup>went</sup> as far as Fernandez is con-  
21 cerned, because last March or February the case was  
22 dismissed against him with regard to anarchy.

23 But that is how I got into this case. And  
24 the whole record shows that, for whatever reason,  
25 the government authorities have been interested in

2 getting Mr. Fernandez not only arrested but con-  
3 victed and sent away to prison for a long time.

4 Now, it is only in the most recent Watergate  
5 disclosures that I have become privvy, as a citizen,  
6 to what the plans of our government have been for  
7 those of the people who have been considered  
8 dissidents.

9 Now, one of the reasons, going back in terms  
10 of philosophy, that I was interested in anarchy was  
11 that I thought it was the kind of vague law that in-  
12 vaded the rights of the citizen who defects from his  
13 government. Now, I don't think that there is a better  
14 example than the <sup>sage</sup> ~~sage~~ which I described of Mr. ~~sage~~

15 Fernandez's arrest starting in 1967, since the time  
16 I started representing him. I do not know about in  
17 detail what happened to him prior to that time. I  
18 know he only had one conviction for assault in the  
19 third degree. And I am told that at one point he  
20 was a gang leader. So that would be consistent with  
21 that as to his youth.

22 I do know that he expressed unpopular ideas.  
23 And I do know that he was identified as a black  
24 panther. I do know from what I was told by the state  
25 authorities that there was surveillance, telephone

2 surveillance of Mr. Fernandez, from 1965 until some-  
3 time in June of 1967.

4 I do know that there was a deputy assistant  
5 district attorney by the name of Anthony Lombardino  
6 who was in Mr. Mackell's office during that period  
7 of time.

8 I do know that Mr. William Lombardino super-  
9 vised two trials -- and I have never seen Mr. Stechel  
10 previously. This is not any kind of personal affidavit  
11 against Mr. Stechel. He may not even know these  
12 facts. I think it is his obligation to find out  
13 about them.

14 But in any event Mr. Lombardino sat through  
15 two trials with Mr. Schlam and I heard with my own  
16 ears when I asked for the 3500 material after Mr.  
17 Sweeney had testified -- I heard him say to Mr.  
18 Schlam, "We cannot give it all to her."

19 I was shocked to hear such a thing in a  
20 federal courtroom when I was trying the case before  
21 Judge Bruchhausen.

22 I immediately got up out of the presence of  
23 the jury and I said to the judge, and the record  
24 reveals it, your Honor, that I heard Mr. Lombardino  
25 say this to Mr. Schlam and that I therefore do not

2 believe I have all the 3500 material.

3           And a representation was made by Mr. Schlam  
4           that I had it.

5           The second trial turned up and suddenly  
6           there were grand jury minutes.

7           Now, this is by way of parenthesis, never  
8           has the government answered any of my accusations  
9           by affidavit or any other way. In their brief they  
10          said that the -- not giving me the grand jury minutes  
11          in one trial was inadvertent. All right, accepting  
12          that, what is the other material? I am now convinced  
13          that there must be other material. We know now, and  
14          the newspaper stories attached to my affidavit show  
15          that we know that the FBI, and possibly the White  
16          House in 1967 wanted Mr. Fernandez to be arrested  
17          for anarchy, and that the FBI must have files with  
18          government surveillance.

19          We now know from the Watergate disclosures  
20          that there have been continuing wiretaps, illegal  
21          activities, on the part of government agency in  
22          terms of surveillance.

23          I do not know how the government was led to  
24          Fred Fernandez on the 18th of February, 56 days  
25          after this bank robbery, to arrest him in his home --

2 MR. STECHEL: Your Honor, it is very clear --

3 MRS. PILL: -- I do know that the preceeding

4 December, and about a week and a half before the so-  
5 called bank robbery on December 24th, I was in the  
6 state court representing Mr. Fernandez on what I  
7 thought was another bum rap, and they brought in a  
8 witness from prison and they tried to get that  
9 prisoner to testify against Mr. Fernandez.

10 And he said, "It is not true. I won't testify  
11 against him. It is not true what you want me to say."

12 Now, that was only ten days before the bank  
13 was robbed and it was something like two months before  
14 his arrest. So now I don't know what led them to  
15 this arrest. And I do not think that it has been  
16 disclosed.

17 I think there is enough to raise a question  
18 for your Honor to request the government to furnish  
19 the necessary affidavits. I think we should know  
20 who the informer was or what their investigation was  
21 with regard to this bank robbery.

22 If the facts cannot be disclosed to me then  
23 they should be disclosed to the Court and the Court  
24 should make a decision as to what should be done  
25 about this.

2 I think we must know what kind of FBI records  
3 there are regarding surveillance. I think we must  
4 know whether my telephone conversations have been  
5 intercepted in any way. I have no way of knowing.  
6 I don't know what the government does. But I want  
7 to know at the time that Mr. Fernandez was brought  
8 before Magistrate Schiffman on the 18th of February,  
9 when Mr. Lawrence Soicher, who was another assistant  
10 United States attorney, and told the Court that the  
11 United States attorney's office had information that  
12 Fernandez had robbed this bank to get money to go to  
13 Algeria to join two other black panthers, Ferguson  
14 and Harrison, who had gone to Algeria.

15 Now, where did they get that information.  
16 There must be some reports. There must be something --  
17 if they have it -- I am not saying it is true -- but  
18 they must have some kind of information in their  
19 files. It seems at this juncture I have a right to  
20 know.

21 Now, as to exhibit N I think this is a rather  
22 shocking state of affairs. The government has,  
23 according to the Court of Appeals' opinion -- the  
24 government has altered an exhibit --

25 MR. STECHEL: They didn't say that --

2                   MRS. PIEL: -- and I was able to show that it  
3                   was altered to the benefit of the government, and  
4                   that because in the third trial I was able to obtain,  
5                   with the greatest of hardship, a film, a surveillance  
6                   film of this bank robbery, I showed it to the Court  
7                   of Appeals. The Court of Appeals looked at that.  
8                   There is no question that the testimony at the trial  
9                   does not match -- does not match the surveillance  
10                  film. And the whitenings on the exhibit are con-  
11                  sistent with an attempt to obscure evidence that had  
12                  been admitted in the two prior trials indicating  
13                  what the eye witnesses had -- where they had said  
14                  the person who was supposed to be Fernandez was  
15                  standing, and they had to change that in order to  
16                  make that testimony consistent with the picture. I  
17                  think this is extremely serious.

18                  And the Court of Appeals has left that issue  
19                  up to the discretion of the District Court as to  
20                  what the District Court would consider.

21                  Now, it is true that there is a suggestion  
22                  that the exhibit can be put back in its original  
23                  shape. Your Honor, I feel where the government has  
24                  tampered with an exhibit it is much more important  
25                  to get to the bottom of the situation than to try to

2 scrape off the whitenings that appear on it. It  
3 seems to me if your Honor rules that it is -- that  
4 the misconduct of the government in changing this  
5 exhibit is still not sufficient to dismiss the  
6 indictment, it must be something that I have a right  
7 to bring out before the jury.

8 But I want to know why they say they did it.  
9 And I have my theory which I have presented just  
10 now. But I want to know why they said they did it.  
11 Mr. Stechel, who has been assigned to this case now  
12 for at least a year, has told this Court he doesn't  
13 know who did it. Now, I think it is very strange  
14 that he has not made some inquiry or has not gotten  
15 to the bottom of it. I do think that at this juncture  
16 the government should come forward with its own  
17 version that is in answer to the facts. And I have  
18 only touched on a few of them that I have set forth  
19 in my affidavit. Of course there is recent precedent  
20 in the Ellsberg case and in the case in Detroit that  
21 is going on where the court has stepped in and has  
22 taken -- has helped the defense discover from the  
23 government information which only the government is  
24 privy to --

25 THE COURT: Well, what do you want to do about

2           the exhibit? Do you want us to try to put it back  
3           in its original form.

4           . MRS. PIEL: No, I don't, your Honor. I want  
5           to know first -- I certainly don't.

6           THE COURT: You don't want anything done about  
7           it.

8           MRS. PIEL: I don't want anything done to the  
9           exhibit. I want to know what the government said  
10          happened to it and why it happened, and I want to  
11          know precisely.

12          THE COURT: Well, I think under the circum-  
13          stances we ought to have an affidavit and answering  
14          papers from the government.

15          MR. STECHEL: Your Honor, I would do that if  
16          you wish. But as far as my own involvement, I have  
17          been under oath in front of a jury. And I would be  
18          happy to produce myself, Mr. Schlam and Mr. Heinemann  
19          for examination in open Court under oath.

20          THE COURT: I understand but at the moment  
21          what I prefer are answering papers.

22          MR. STECHEL: All right.

23          THE COURT: I will let counsel know if I want  
24          further argument or further appearances.

25          Have we set the case for trial? How long will

2 it take to be retried.

3 MRS. PIEL: It took two weeks the last time.

4 I don't know the reason. Part of the reason for the  
5 two weeks had to do with a lot of these objections.

6 If a lot of this work is out of the way it might go  
7 much more quickly.

8 THE COURT: Is the defendant in jail?

9 MRS. PIEL: The defendant is in Atlanta, in  
10 the penitentiary.

11 THE COURT: Serving another sentence?

12 MRS. PIEL: Serving this sentence. They haven't  
13 brought him back --

14 THE COURT: I don't understand. How can he  
15 be in jail if the matter -- he is serving a sentence  
16 in this case?

17 MRS. PIEL: Well, Judge Travia gave him a  
18 twenty year sentence.

19 THE COURT: I don't understand. That has  
20 been set aside.

21 MRS. PIEL: Well I am not the government,  
22 your Honor --

23 THE COURT: But you are his attorney.

24 MRS. PIEL: He is in Atlanta.

25 THE COURT: How can you let a man stay in the

2           penitentiary that way. Do you mean he has been  
3           staying there since the reversal?

4           MRS. PIEL: That is exactly right.

5           THE COURT: I must say, and I do not want to  
6           be critical, but how can you allow that to happen.

7           MRS. PIEL: He couldn't get out on bail. He  
8           has a state sentence.

9           THE COURT: He is serving a state sentence or  
10          what?

11          MRS. PIEL: Well, I suppose the time will be  
12          used against the state sentence, yes.

13          MR. STECHEL: Assault on a policeman. He was  
14          convicted.

15          THE COURT: Well, he is not a convicted de-  
16          fendant here. I do not see how we have any right to  
17          hold him. Get him back here and turn him over to  
18          the state if that is what the situation is.

19          MRS. PIEL: Your Honor, I have had so much  
20          difficulty --

21          THE COURT: You do not have any difficulty  
22          with the government if you don't ask the Court for  
23          relief. You will get whatever you are entitled to  
24          from the Court.

25          MRS. PIEL: I ask --

2 THE COURT: The defendant is entitled to be  
3 released from federal custody obviously.

4 MR. STECHEL: Is that the Court's position?

5 THE COURT: Well, what is your position on it.

6 MR. STECHEL: He has twice been convicted.

7 THE COURT: He has now had his conviction set  
8 aside by the Appellate Court. Are you appealing to  
9 the United States Supreme Court?

10 MR. STECHEL: No, we thought about it --

11 THE COURT: Well, he is an innocent man as  
12 far as this Court is concerned. And he is presumed  
13 to be innocent like any other person, like you or I,  
14 and he's entitled to walk the streets unless there  
15 is a reason to keep him in.

16 MR. STECHEL: The government is ready for  
17 trial. As I say, he has already been convicted twice  
18 of armed robbery, and he has a very long criminal  
19 record.

20 THE COURT: He may not be kept in a penitentiary  
21 of the United States when he is a man who is presumed  
22 to be innocent. You and I both know that. There is  
23 no issue.

24 MR. STECHEL: What about West Street, which  
25 is not a penitentiary.

2 THE COURT: Is he now serving a state sentence  
3 in addition?

4 MRS. PIEL: He was sentenced on a case -- last  
5 August, August 30th, he was sentenced to four years  
6 in a state penitentiary.

7 Now, any time that he is not serving on a  
8 federal sentence and is in federal custody, that time  
9 is applicable against the state sentence whether he  
10 is in state custody or not.

11 THE COURT: I do not want him in federal  
12 custody. There is no reason for us to have him.  
13 We have no right to hold him. He is to be returned  
14 forthwith and turned over to the state.

15 You should have moved for that at once. I  
16 don't understand why we have him unless he prefers  
17 federal hospitality.

18 MRS. PIEL: No, your Honor, I am very pleased  
19 at your ordering that.

20 THE COURT: Are we setting this down for  
21 trial on December 3 at 10 o'clock? Is that satisfactory  
22 to the defendant.

23 MRS. PIEL: Yes your Honor.

24 MR. STECHEL: The government is ready now  
25 and will surely be ready again on December 3rd.

2 THE COURT: I hope so.

3 MR. STECHEL: It has been ready many times  
4 already on this case.

5 THE COURT: All right, I will reserve decision  
6 after I receive the papers from the government and  
7 after the defendant has had an opportunity to reply.

8 MR. STECHEL: Well, your Honor, let me just  
9 make sure what I am to do is correct. Affidavits  
10 on the exhibit question, the marking of the exhibit --

11 THE COURT: I want a response from the  
12 government. How you respond is for the government  
13 to decide and not me. I am deciding the case and  
14 not writing your brief.

15 Thank you very much.

16 MR. STECHEL: Very well.

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**EXCERPTS FROM MINUTES OF PROCEEDINGS ON  
NOVEMBER 16, 1973 BEFORE HON. JACK B.  
WEINSTEIN, U.S.D.J.**

**[Pages AA-62 to AA-69 following]**

2 THE COURT: November 30th, that is all  
3 right?

4 MR. PATTISON: Yes, sir -- which will be the  
5 weekend.

6 THE COURT: What is November 30th, a Friday?  
7 Return them at 9 o'clock on the 30th.

8 MR. VANDERVERT: That is good.

9 THE COURT: You will have that weekend  
10 to work on them.

11 MR. VANDERVERT: Thank you very much.

12 THE COURT: Do you have a place to put  
13 them?

14 MR. VANDERVERT: I'm going to have to borrow  
15 an envelope.

16 THE COURT: We will get you something.

17 MR. VANDERVERT: Thanks.

18 THE COURT: Get my secretary to give him  
19 one of those large envelopes with tape on them.

20 MR. VANDERVERT: Thank you very much.

21 THE COURT: You are quite welcome.

22 Now what?

23 MS. PIEL: Right now we might as well go  
24 down the numbers of the agenda.

25 The first one I brought up before your

2 Honor, I wrote your Honor a letter on September 27th  
3 stating the inadequacies, the specific inadequa-  
4 cies in the affidavit. Your Honor has read the  
5 transcript of our meeting on November 9th by  
6 ourselves, I mean my meeting with Mr. Pattison,  
7 and it is my feeling that the Government should  
8 be required to respond specifically to the allega-  
9 tions in my affidavit of July 11, 1973, that is  
10 as to whether or not now Judge Neaher, then the  
11 United States Attorney for the Eastern District  
12 of New York has any knowledge of matters attri-  
13 buted to him in that affidavit, the source of  
14 Mr. Socher's knowledge, when he stated, as appears  
15 in the affidavit before the Magistrate on the  
16 18th of February that the Government had infor-  
17 mation that Mr. Fernandez robbed the bank in  
18 order to go to Algiers, in order to join one  
19 Ferguson and one Harris -- I don't remember their  
20 first names. There should also be a response  
21 from the Government as to an increase made of  
22 Mr. Anthony Lombardino, who was then at the  
23 time of the first two trials in charge of the  
24 Criminal Division of the United States Attorney's  
25 Office for the Eastern District.

2 I feel in the main that there should be a  
3 response predicated upon information which has come  
4 out of the Watergate disclosures that there was  
5 a Houston plan and a plumbers unit where special  
6 attention was devoted to Black militants during  
7 1970-71, and that my client, Mr. Fernandez, might  
8 well qualify as the target of that kind of an  
9 investigation.

10 THE COURT: Well, so far as I can tell,  
11 this plumbers unit was pretty much a bunch of  
12 bumbler. The question is wherein it came to the  
13 prosecutor and if anything led to his arrest.

14 MS. PIEL: Exactly that.

15 THE COURT: I am not going to go into the  
16 White House, it just seems to be a morass. I'm  
17 not going to go to Watergate unless there is  
18 something much more explicit. I don't believe  
19 that is here.

20 So far as people who made statements to  
21 the press are concerned, you are certainly  
22 entitled to find out what the basis of their  
23 information was. I don't think an inquiry by  
24 the Government is going to do much good. I think  
25 you are going to have them here for a hearing;

2 I think the best thing to do is to have a hearing  
3 and put the burden on you. I think the Govern-  
4 ment can do very much for you.

5 MS. PIEL: All I can do at such a hearing --  
6 I have no information other than what I would  
7 have presented.

8 I would like such a hearing.

9 MR. PATTISON: May I just say to the  
10 Court that our answering papers concerning wire-  
11 taps bear upon this issue and that a search was  
12 made, a total search was made and there were no  
13 wiretaps used in this case.

14 THE COURT: I understand that, I have  
15 read the record, but I think that when prosecu-  
16 tors go around making statements to the press,  
17 this is what happens.

18 All right. When is it set for trial?

19 MS. PIEL: The 3rd of December.

20 THE COURT: November 27th for a hearing.

21 What time -- well, 10 o'clock for a hearing.

22 Call your witnesses, you will have to  
23 get out your subpoenas and have them here on  
24 that day and time.

25 MR. PATTISON: To whom, your Honor, was

2 the Court referring to?

3 THE COURT: Ms. Piel.

4 MS. PIEL: I have the burden of whatever  
5 I can prove.

6 MR. PATTISON: Very well.

7 MS. PIEL: Thank you.

8 THE COURT: The Government in my opinion  
9 has exhausted the request that the Court made of  
10 it, and I have no further directions to the pro-  
11 secutor in connection with your item 1 of November  
12 15, 1973.

13 MS. PIEL: Thank you, your Honor.

14 Now, as to item No. 2.

15 THE COURT: That is their exhibit.

16 MR. PATTISON: I believe that we left one,  
17 that would be the top of page 2, these affidavits.

18 MS. PIEL: Right.

19 MR. PATTISON: I have found them and here  
20 is a copy which the Court might wish to mark.

21 I have the original or this is also a  
22 carbon copy which was in my file.

23 THE COURT: All right, mark this Xerox as  
24 an exhibit, Court Exhibit 4, 11/16/73.

25 MS. PIEL: Do you have another copy?

2 handed it to you and the record is clear on that.

3 We have never had any other list.

4 MS. PIEL: I don't wish to go into things  
5 that we have gone into many times before.

6 THE COURT: Do you have that list?

7 MS. PIEL: I would like the Government  
8 "to furnish me with what Mr. Pattison is now  
9 saying is 22 names.

10 THE COURT: Do you have a list of 22 names?

11 MS. PIEL: I have no list in that order.

12 THE COURT: Do you have the list -- excuse  
13 me.

14 MR. PATTISON: When we speak about the  
15 list --

16 THE COURT: Do you have 22 names?

17 MR. PATTISON: I have 22 names, yes.

18 I believe you have also --

19 THE COURT: Furnish them.

20 MR. PATTISON: I will again furnish it,  
21 again.

22 THE COURT: Furnish it in a letter.

23 All right, next.

24 MS. PIEL: Now I have set forth as to item  
25 5 what happened at the last trial with regard

2 to a file which the Government handed over in  
3 camera to Judge Travia and which Judge Travia  
4 looked at and returned to the Government. That  
5 file was never before the Court of Appeals, it  
6 was not one of my 21 points on appeal after the  
7 last trial.

8 THE COURT: Do you have that file?

9 MR. PATTISON: I don't know, your Honor,  
10 we --

11 THE COURT: Where is it?

12 MR. PATTISON: We may have, but we will  
13 not turn it over.

14 THE COURT: Turn it over to me, I will  
15 look at it.

16 MR. PATTISON: All right.

17 THE COURT: You will do that by turning  
18 it --

19 MR. PATTISON: Today?

20 THE COURT: No, you will turn it over to  
21 me in the presence of Ms. Piel on November 27th  
22 at the hearing so that it can be physically  
23 marked and so that she can observe what is being  
24 turned over and so that we can seal it for pur-  
25 poses of possible appeal beyond that, so furnish

2 me with a Xerox copy that can be sealed.

3 MR. PATTISON: Yes, your Honor.

4 MS. PIEL: And the last point has to do  
5 with what your Honor had already said, there is  
6 to be another hearing with regard to identifica-  
7 tion.

8 THE COURT: We will do that on the 27th.

9 MR. PATTISON: May I just say that the  
10 Court of Appeals ruled on this and they felt  
11 that there should not be any other Wade hearing.

12 MS. PIEL: I have the language here and  
13 Mr. Piel is right in one sense, but --

14 THE COURT: What page?

15 MS. PIEL: I still wish -- page 3713,  
16 starting at the bottom of the page -- yes, 3713,  
17 towards the top:

18 "Although we adhere to our ruling" --

19 THE COURT: Are we looking at the same  
20 transcript?

21 (Ms. Piel indicated the page.)

22 MS. PIEL: But there is another section  
23 which I want your Honor to read before you rule,  
24 and that has to do with Exhibit N, which we were  
25 talking about, and that is page 3722, sort of

**AA-70**

**MINUTES OF PROCEEDINGS ON NOVEMBER 28, 1973**

**BEFORE HON. JACK B. WEINSTEIN, U.S.D.J.**

**[Pages AA-71 to AA-83 following]**

[1]

AA-71

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 -----X-----

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 - against -

71 CR 218

7 FRED FERNANDEZ,

8 Defendant.

9 -----X-----

10 United States Courthouse  
11 Brooklyn, New York

12 November 28, 1973  
13 9:30 A.M.

14

15

16 Before:

17 HON. JACK B. WEINSTEIN, U.S.D.J.

18

19

( Criminal Hearing )

20

21

22

23

24

Ilene Ginsberg  
25 Acting Official Court Reporter

1 [2]

AA-72

2 A P P E A R A N C E S :

4 ROBERT A. MORSE, U.S. ATTORNEY

5 By: JOSEPH RYAN for THOMAS PATTISON, AUSA

7 ELEANOR JACKSON PIEL, ESQ.  
8 Attorney for defendant.

2 THE CLERK: Criminal hearing, U.S.A. v.

3 Fred Fernandez.

4 MR. RYAN: Good morning.

5 Mr. Pattison is working out of the office  
6 today and I am filling in for him.

7 THE COURT: Good morning.

8 I have --

9 MS. PIEL: Mr. Fernandez should be here.  
10 He was brought here.

11 THE COURT: Oh, yes. Bring him in.

12 (Whereupon defendant entered courtroom)

13 THE COURT: I have carefully examined the  
14 documents taken into my custody yesterday at the  
15 request of defense counsel.

16 With respect first to the documents turned  
17 over by the police department, Court exhibit 2a,  
18 which is a brown folder consists of documents in  
19 connection with indictment number 134-68 in which  
20 Eleanor Jackson Piel is listed as defense counsel.

21 All of the documents in this file are  
22 public except for some notes that are of no sig-  
23 nificance to anyone.

24 MS. PIEL: Your Honor, aren't those papers  
25 from the Queens District Attorney's Office rather

2 than the police department?

3 THE COURT: I am sorry. Did I say police  
4 department? I meant Queens office.

5 There is nothing in them that has any  
6 bearing whatsoever on this case.

7 There is a green folder from the same  
8 source, indictment number 1224-67. The papers  
9 consist primarily of grafts, of Court memoranda  
10 and public documents. In this case took Eleanor  
11 Jackson Piel is listed as attorney for the  
12 defendant and all of the documents here would have  
13 come to her attention and been in her own files.

14 I examined a white folder from the same  
15 source, indictment number 1849-68. These docu-  
16 ments, except for some private interviews of  
17 witnesses and some photographs of the scene of the  
18 alleged crime, are all matters of public record.

19 This represents the case I believe I  
20 referred to yesterday by the witness --

21 MS. PIEL: I don't believe so, your Honor --

22 THE COURT: Who indicated that the defen-  
23 dant could not be properly prosecuted because one  
24 of the witnesses refused to testify.

25 MS. PIEL: That was a different case, your

2 Honor.

3 This case was tried in December of 1970 and  
4 the one that Mr. Lombardino spoke of was tried in  
5 the spring of 1967 and I wasn't counsel in the one  
6 that Mr. Lombardino spoke of but I was finally.

7 THE COURT: He didn't testify.

8 MS. PIEL: He did testify.

9 THE COURT: Well, yes -- after the indi-  
10 cations were that he was threatened by the defen-  
11 dant and shots were actually fired. It has nothing  
12 to do with the case before us and the information  
13 would have been or should have been fully available  
14 to counsel for the defendant.

15 I turn now to a red file, appellate division  
16 A-8529, consisting of documents used in preparation  
17 of an appeal in this case consisting of transcripts  
18 and drafts of briefs for the appellate division,  
19 none of which has any bearing on the case before us  
20 and all of which in final form were actually in  
21 the hands of present counsel for the defendant who  
22 represented the defendant on the appeal here, indict-  
23 ment number 1725-67.

24 : I turn now to a file marked appellate  
25 division A-8529, a red file that consists of

2 additional documents on the appeal consisting pri-  
3 marily of copies of the respondent's brief in this  
4 case. In this case there was a conviction and as  
5 I understand it the matter is presently on appeal.

6 MS. PIEL: On submission.

7 THE COURT: None of the papers in those  
8 five files has any bearing on this case and the  
9 Clerk of the Court is directed to get in touch with  
10 the District Attorney's Office, Queens County, and  
11 to arrange for the transfer of those files to their  
12 original source unless there is some objection.

13 MS. PIEL: No objection.

14 THE COURT: I turn now to Court exhibit 1  
15 marked Judge Travia, United States v. Fred Fernandez,  
16 71 CR 218, a sealed file containing F.B.I. reports.  
17 As I understand, this was a file given to Judge  
18 Travia at some time during the last trial. I have  
19 read all the documents in the case file.

20 I have placed a check mark on certain pages  
21 and I direct the Clerk of the Court to zerox these  
22 pages and to furnish a copy to the United States  
23 Attorney and a copy to defense counsel.

24 The pages -- which I believe in the main  
25 were turned over to defense counsel as part of

2       3500 material -- consist of possible Brady type  
3       material which I believe should be turned over.

4           I have also examined the rest of the file.

5       I find that based on these reports the investiga-  
6       tions of the F.B.I. was unexceptional. I find no  
7       evidence whatsoever directly or indirectly, that  
8       the F.B.I. obtained leads from any illegal sources.

9       I feel there is no reason to conceal the entire  
10      report but the Government has, under a law, the  
11      option, I believe of retaining it. I suggest the  
12      Government consider whether the entire report should  
13      be made available because I see nothing adverse  
14      and it is possible that I missed something that  
15      defense counsel may find helpful which I do not find  
16      particularly helpful.

17           MR. RYAN: We will.

18           THE COURT: I want the Deputy Clerk of this  
19      part, Mr. Ralph Sacco to himself, personally, zerox  
20      these pages so I know it is done properly and that  
21      the copies are transmitted.

22           The pages are marked 44, 1/6/71 by S.A.  
23           Eugene Landolfi.

24           The same type of imprinted number, 45, 1/18/71  
25           S.A. Lawrence Sweeney.

2 Forty-six; 1/17/71; S.A. Lawrence Sweeney.

3 Fifty-one; 1/17/71 by S.A. Lawrence T.

4 Sweeney and others.

5 A continuation of that report with imprinted  
6 number 52, 53, 56; 1/20/71 by S.A. Lawrence T.

7 Sweeney.

8 Imprinted number 57; 1/20/71; S.A. Lawrence  
9 T. Sweeney and others.

10 Sixty-seven, with an asterisk; 12/31/70  
11 by S.A. Lawrence T. Sweeney.

12 Page numbered "P" at the bottom; 4/21/71,  
13 report of Lawrence T. Sweeney.

14 A new series of numbers typed; page 4;  
15 2/4/71 by S.A. Charles A. McDougall.

16 A continuation of that typed page number 5  
17 designated number 5A.

18 Page of that same series but imprinted  
19 number 7; 3/2/71 by S.A. Lawrence T. Sweeney.

20 Printed number 8 of that series; 3/27/71  
21 by S.A. Lawrence T. Sweeney.

22 Printed number 9; 3/27/71 by S.A. Lawrence  
23 T. Sweeney.

24 Printed number 10; 3/2/71 by S.A. Lawrence  
25 T. Sweeney.

2 Printed number 12 in series, 3/2/71; S.A.

3 Lawrence T. Sweeney.

4 Imprinted number 13, 3/2/71 by S.A. Lawrence  
5 T. Sweeney.

6 Imprinted number 14, 3/2/71 by S.A. Lawrence  
7 T. Sweeney.

8 Imprinted number 17, 3/2/71, S.A. Lawrrence  
9 T. Sweeney and others.

10 Number 18 of that report, 19 of that report.

11 Imprinted number 24 of that series marked  
12 April 9, 1971 by S.A. Lawrence T. Sweeney.

13 Report of the F.B.I. lab dated March 8,  
14 1971 typed page number at the bottom, 27 and a  
15 continuation of that report typed page number 28.

16 Report of the Identification Division Latent  
17 Fingerprint Department, March 30, 1971, page 30  
18 and a continuation of that report, typed page 31  
19 at the bottom.

20 A new series --

21 MS. PIEL: I thought I saw --

22 THE COURT: Just a moment.

23 A numbered report of Lawrence T. Sweeney;  
24 2/24/71 and a continuation of that report unnumbered,  
25 not imprinted.

2 Six; series 6/20/71 by S.A. Lawrence T.

3 Sweeney.

4 Printed part of that series; 10; 1/27/71

5 by S.A. Lawrence T., Sweeney.

6 A continuation, printed number 11.

7 Printed number page 14 -- note that 12  
8 and 13 are not present -- 1/27/71 by S.A. Lawrence  
9 T. Sweeney.

10 Printed number 15, continuation of that  
11 report apparently dated 1/26/71 by S.A. Lawrence  
12 T. Sweeney and a continuation of that report, printed  
13 number 16.

14 Imprinted 17; 1/26/71 by S.A. Lawrence T.  
15 Sweeney and a continuation of that report, imprinted  
16 number, 18.

17 Imprinted number 19; 1/26/71 by S.A.  
18 Lawrence T. Sweeney; a continuation of that report  
19 printed number 20.

20 Printed number 21; 1/26/71 by S.A. Lawrence  
21 T. Sweeney.

22 Imprinted number 22; 1/26/71 by S.A.  
23 Lawrence T. Sweeney and a continuation of that  
24 report, imprinted number 23.

25 Number 24; 1/26/71 by S.A. Lawrence T.

2 Sweeney.

3 Number 25; 1/26/71 by S.A. Lawrence T.

4 Sweeney.

5 Imprinted number 32; 2/10/71 by S.A. Lawrence  
6 T. Sweeney.7 Imprinted number 33; 2/10/71 by S.A. Lawrence  
8 T. Sweeney.9 Imprinted number 34; 2/10/71 by S.A. Lawrence  
10 T. Sweeney.11 Imprinted number 35; 2/10/71 by S.A. Lawrence  
12 T. Sweeney.13 Imprinted number 36; 2/10/71 by S.A. Lawrence  
14 T. Sweeney.15 Imprinted number 37; 2/10/71 by S.A. Lawrence  
16 T. Sweeney.17 Imprinted number 38; 2/10/71 by S.A. Lawrence  
18 T. Sweeney.19 Imprinted number 39; 2/10/71 by S.A. Lawrence  
20 T. Sweeney.21 Number 40; 2/10/71 by S.A. Lawrence T,  
22 Sweeney.23 Imprinted number 43; 2/11/71 by S.A.  
24 Lawrence T. Sweeney and a continuation of that report  
25 imprinted number 44.

2 Imprinted number 50; 2/22/71 by S.A.

3 Kenneth R. Smith and others.

4 Fifty-two; 2/22/71 by Eugene Terrafranco  
5 and others.

6 Number 53; 2/18/71 by S.A. Kenneth R.  
7 Smith and two others and an apparent continuation  
8 of that report, imprinted number 54.

9 Imprinted number 55; 2/22/71 by S.A.  
10 Lawrence T. Sweeney and a continuation of that  
11 report, imprinted number 57, stricken and 56 written  
12 in.

13 On imprinted number 56, the prior page, the  
14 number is stricken and 55 is written in ink.

15 A continuation of that report, imprinted  
16 number 58 stricken and 57 written in.

17 Yes?

18 MS. PIEL: I thought I saw, upside down,  
19 your Honor, a record of Mr. Fernandez criminal --  
20 what do they call it -- the yellow sheet? I  
21 wonder if I may have that?

22 THE COURT: You were not given the record  
23 of the defendant prior to trial? It is a public  
24 record.

25 MS. PIEL: I don't believe I was. I don't

2 want to say absolutely but I don't believe so  
3 and I'd like a copy.

4 MR. RYAN: No objection.

5 Your Honor, I think the envelope should be  
6 checked. I believe there is a page in there --

7 THE COURT: Yes. Thank you very much.

8 Page 59 imprinted, stricken out and 58  
9 written in continuation of the last report.

10 Thank you very much. I am putting a check  
11 mark on typed pages numbered 33, 34 and 35 of the  
12 second series of documents constituting the apparent  
13 record of Mr. Fernandez as of that date.

14 Anything further?

15 MS. PIEL: No. Thank you.

16 THE COURT: Thank you.

17 The case is recessed until Friday at ten  
18 o'clock.

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**AA-84**

**EXCERPTS FROM MINUTES OF PROCEEDINGS ON  
NOVEMBER 30, 1973 BEFORE HON. JACK B.  
WEINSTEIN, U.S.D.J.**

**[Pages AA-85 to AA-94 following]**

1 [15]

2 THE COURT: All right. Now, let's --

3 MR. PATTISON: I am not sure whether --  
4 may I look at that set now? I believe that the  
5 Court placed -- I am not sure whether these  
6 notes which I have --

7 THE COURT: Yes, you can look at them.

8 MR. PATTISON: Which were taken by Mr. Ryan  
9 are in fact accurate. I can cite --

10 THE COURT: Mark this envelope 1-A and  
11 turn it over to Government counsel.

12 MR. PATTISON: It will take me only one  
13 second.

14 THE CLERK: Marked Court Exhibit 1-A.

15 THE COURT: Mark this other envelope  
16 1-D, which is the one the Clerk prepared for  
17 defense counsel which we will hold until the  
18 Government can make a submission. Normally,  
19 I would not, because the Government has obviously  
20 seen all this material already so there is nothing  
21 that they are going to learn from it that they  
22 don't know.

23 MRS. PIEL: Your Honor, so that it is  
24 perfectly clear, the Second Circuit did not have  
25 any of this material before it. Judge Travia had

2 the envelope. He looked at it and he gave it back  
3 to the Government and it was never before the  
4 Court.

5 THE COURT: I understand.

6 MRS. PIEL: So I don't know what is in  
7 it, of course. It may be that there is something --  
8 I have always felt that there must have been  
9 some exculpatory material in it that has not been  
10 revealed to me.

11 THE COURT: Excuse me. I am making this  
12 decision myself based on my observations.

13 I don't believe that the Circuit Court  
14 intended to inhibit me, nor do I believe that it  
15 had any power to do so. I am going to decide  
16 this case my way --

17 MR. PATTISON: Your Honor --

18 THE COURT: (Continuing) In order to insure  
19 that the defendant is given a fair trial, and  
20 that if he is tried, tried fairly. And if found  
21 guilty, we don't have the absurdity of another  
22 trial in this case.

23 MR. PATTISON: Your Honor, there are only  
24 seven pages out of all which we feel should not  
25 be turned over now.

2 THE COURT: Well, what are they?

3 MR. PATTISON: They are -- and may I list  
4 them?

5 THE COURT: Let me get them.

6 MR. PATTISON: Your Honor, in the -- the  
7 first page -- that is the one that -- 44, 45,  
8 46.

9 THE COURT: What is this? The defendant  
10 is alleged to have worn the long dark coat.

11 MRS. PIEL: Peacoat.

12 THE COURT: Peacoat.

13 MR. PATTISON: No. There was another  
14 male, Reide, who wore the long leather trench  
15 coat, I believe, or a leatherish trench coat.

16 MRS. PIEL: There is a long black rain-  
17 coat. Because your Honor is going to see the pic-  
18 ture right in the Wade hearing.

19 THE COURT: Let me describe this. A  
20 person said he recognized the photograph of the  
21 short, stocky Negro male apparently smiling, as  
22 the man named Hassan.

23 That has nothing to do with your client.

24 Was Hassan one of the people convicted?

25 MR. PATTISON: Yes.

2 MRS. PIEL: He was tried.

3 MR. PATTISON: Hassan Howard.

4 MRS. PIEL: He was tried and convicted.

5 THE COURT: Understand the Negro wearing  
6 the long, dark coat, light-colored sweater or  
7 shirt, black cap, dark color scarf is another  
8 young Black, Jerome -- who is that?

9 MR. PATTISON: That is Reide, your Honor.

10 THE COURT: That's Reide.

11 He indicates the other two photographs  
12 were unknown to him.

13 Well, you don't need 44 then. If there  
14 is other reasons to -- so I will pull 44 off.

15 MR. PATTISON: Your Honor, 45, 46 are --  
16 I would ask the Court to make any -- in making  
17 any comments that it does with care as to -- not  
18 to reveal the locus of the various persons.

19 THE COURT: He was shown the four surveillance  
20 photographs. He indicated that a short, stocky  
21 Negro wearing a light-colored jacket and sun-  
22 glasses was Horace Howard. He was tried.

23 MR. PATTISON: Yes.

24 MRS. PIEL: Called Hassan by some people.  
b

25 MR. PATTISON: Yes.

1 [19]

2 THE COURT: Young Negro male wearing long  
3 coat, light-color sweater was Jerome Reide.

4 No problem there.

5 The light-completed Negro male with the  
6 large Afro haircut bears a strong physical resem-  
7 blance to a third associate of Howard N. Reide  
8 by the name of Arthur Tier.

9 MRS. PIEL: That is the one supposedly  
10 Fernandez.

11 MR. PATTISON: Yes.

12 THE COURT: So that the fellow --

13 MR. PATTISON: Fernandez. Or that is the  
14 man whom --

15 MRS. PIEL: You contend.

16 MR. PATTISON: We allege to be. And this  
17 fact was made known prior to the last trial.  
18 Tier was in fact locked up for and in fact  
19 charged -- charged with this crime. The charges  
20 were later dropped against him. This fact was  
21 made known and it was made use of on cross-  
22 examination numerous times at every trial.

23 THE COURT: Were these two witnesses --

24 MR. PATTISON: No.

25 THE COURT: (Continuing) -- in 45 and 46

2 made known?

3 MR. PATTISON: No. They are the infor-  
4 mants talked of by the Court -- by the Court of  
5 appeals.

6 THE COURT: They are not the normal type  
7 informants.

8 MR. PATTISON: No.

9 THE COURT: These are figures --

10 MR. PATTISON: Well, your Honor, I would  
11 urge the Court not to make any other reference.

12 THE COURT: Are they Blacks?

13 MR. PATTISON: No.

14 THE COURT: They are white?

15 MR. PATTISON: Yes.

16 THE COURT: Still there --

17 MR. PATTISON: Yes, they are.

18 MRS. PIEL: I can't think of anything more  
19 exculpatory, your Honor, than somebody who looks  
20 at a picture, knows people who are identified  
21 by other people, and have been convicted of the  
22 robbery, and then says that the one who's sup-  
23 posed to be the defendant is someone else.

24 THE COURT: Where is Tier now?

25 MRS. PIEL: Tier is --

2 MR. PATTISON: I don't know.

3 MRS. PIEL: Somewhere in Queens. However,  
4 I do want to tell your Honor something extremely  
5 interesting. When the case was awaiting trial  
6 before Judge Travia I moved the State case -- that  
7 was when we were still asking for a trial in  
8 Queens, and that was in August of 1952 --

9 MR. PATTISON: 1972.

10 MRS. PIEL: '72. Excuse me.

11 Mr. Fernandez was then taken by writ of  
12 habeus corpus from the Federal Court to the State  
13 Court. And he was put in a cell with Mr. Tier.

14 MR. PATTISON: Your Honor, I don't know  
15 anything about that. I certainly --

16 MRS. PIEL: I am only telling you that that  
17 took place. Mr. Tier was arrested for a period  
18 of time when Mr. Fernandez -- and then he was  
19 released.

20 THE COURT: I am going to turn this over  
21 not on the theory discussed in the Court of  
22 Appeals decision, United States of America v.  
23 Fred Fernandez, No. 725, September term, 1972,  
24 Docket No. 72-2229, three pages, 3717, 3718. The  
25 reason for that is, as I understand counsel's

2 posture now for the defendant, it is that this  
3 defendant is being prosecuted because the Govern-  
4 ment want's to get a member of the Black Liberation  
5 Army movement -- whatever that is -- and it is  
6 arguable that having had people who identified  
7 others as being shown in the photograph during  
8 the course of the investigation, that the inves-  
9 tigation was -- turn to Fernandez in order to  
10 convict him not for this crime, but because they  
11 wanted to put him out of the way.

12 I don't consider that a very substantial  
13 argument. But in light of all the events, it  
14 seems to me arguable. And it's not a question  
15 of that it was considered by the Appellate Court --

16 MR. PATTISON: Your Honor, may I --

17 THE COURT: I believe that these people  
18 are not informers of the normal type who turn  
19 in information that they receive with respect to  
20 a crime and are part of a gang and therefore would  
21 be expected to be in danger. These are public  
22 officials --

23 MR. PATTISON: Your Honor --

24 THE COURT: Of a nature --

25 MR. PATTISON: May I ask --

1 [23]

2 THE COURT: (Continuing) -- known to the  
3 public.

4 MR. PATTISON: May I ask for a stay before  
5 any further comment is made as -- which may --

6 THE COURT: I don't see any point in the  
7 stay here because we are just going to hold the  
8 trial all over while you go up for -- You have  
9 no right to go up on this, do you?

10 MR. PATTISON: Yes, we have, your Honor.

11 THE COURT: You do? Under what?

12 MR. PATTISON: On a writ.

13 THE COURT: Mandamus?

14 MR. PATTISON: Yes.

15 THE COURT: That's true. All right.

16 MR. PATTISON: These are arguments which  
17 were made before the Court of Appeals.

18 THE COURT: Well, I know. But the Court  
19 was deciding whether another Court was in error.  
20 I now have the primary responsibility for insuring  
21 the prompt and efficacious disposition of this  
22 case. I am prepared to go forward forthwith  
23 and try this case and get it finally determined.  
24 If you want to go forward and get a stay, you  
25 may do so.

1 [24]

2 MR. PATTISON: May I have a stay until  
3 2 o'clock today?

4 THE COURT: Yes.

5 MR. PATTISON: A temporary stay to at least  
6 allow me to talk it over with --

7 THE COURT: All right. 45 and 46, I am  
8 taking and putting it aside.

9 MR. PATTISON: Very well, your Honor.

10 THE COURT: It's stayed as to 45 and 46.  
11 44, I am suppressing. And I am placing 44 in the  
12 envelope with Court Exhibit 1.

13 MR. PATTISON: Very well.

14 THE COURT: All right, what is your next --

15 MR. PATTISON: Well, the other pages would  
16 be page 61.

17 THE COURT: Of this first series?

18 MR. PATTISON: Of this, yes. First series.  
19 Mainly on the grounds that it bears no merit  
20 here.

21 THE COURT: Well, let me read it.  
22 All right. He identified the short,  
23 stocky Negro as Hassan. The Negro male in the  
24 long black coat, black cap, dark scarf, was similar  
25 to Reide.

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Date March 6, 1974.  
Firm Hon. Edward Colm Gayd V  
By U.S. Atty

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2 JUN 1974

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